



LITTLETON

**Are these really your own words?**

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# What we will cover

- What was wrong with the old ways
- What can/must be said under the new rules
- What can/must be done under the new rules

# What is wrong with the old ways

“

*Nothing is so painful to the human mind as a great and sudden change*

Mary Wollstonecraft Shelley, Frankenstein

”

## **Witness evidence working group**

- Judicial complaints about the efficacy of witness evidence
- Commercial Court Users' Committee March 2018
- Establishment of the working group
- Online survey
- Focus groups

# The old model

- Exchange of statements following disclosure
- Oral evidence-in-chief possible but rarely ordered
- PD32
  - 18.1 ‘if practicable be in the intended witness’s own words’
  - 18.2 - identify which part of its contents are within the intended witness’s own knowledge; and where matters are hearsay, it must state the source of the information or belief on which they are based
  - 20 – requirement for the statement of truth
- Contempt of court (r32.14), exclusion of evidence (32PD25.1)

# Court guides

- Be as concise as the circumstances allow
- Should not contain lengthy quotations from documents
- Seldom necessary to exhibit documents
- Should not engage in legal or other argument
- Usually chronological
- Reference to list of issues
- Numbered paragraphs

## The criticisms

"All of the witnesses in this claim were born in Sri Lanka, and spoke Tamil as their first language. None of them were fully fluent in English. It was clear that the statements of the non-professional witnesses had not been drafted in their own words (contrary to the guidance in para 19.2 of the Chancery Guide). This was very unsatisfactory and increased the difficulty of evaluating the weight to be given to their evidence."

Uthyavel v Raviraj [2021] EWHC 501(Ch)

## The criticisms

"A further observation does not reflect adversely on Mr Frawley but on whoever was responsible for drafting his witness statement. It was 22 pages long, comprised 111 paragraphs and contained a great deal of comment and commentary that has no proper place in a witness statement. Witness statements are for the giving of evidence, not for arguing the case, making points against the opponent, or providing commentary on documents"

Ceviz v Frawley & Anor [2021] EWHC 8 (Ch)

## The criticisms

”witness statement was very long at 87 pages. It struck me as being a somewhat over-lawyered document. I would estimate that around two-thirds of it comprised long excerpts from or her comments on documents. It did contain some of her own recollection but that was unfortunately to a significant extent buried under a super-structure of reconstructed narrative based on documents”

One Blackfriars Ltd, Re [2021] EWHC 684 (Ch)

## Scope of the new rules

- Practice Direction 57AC and Appendix “Statement of Best Practice”
- Despite its title, compliance with the Appendix is mandatory – paragraph 3.4
- Limited to final trial hearings at Business and Property Courts
- Takes precedence over other practice directions in the event of a conflict
- Sanctions

# The new rules: what should witness evidence address?

Paragraph 3.1 & appendix paragraph 2.3 - must contain only:

- Relevant issues of fact of which witness has personal knowledge
- Personal knowledge narrowly defined: experienced by primary senses or a matter internal to their mind
- Other evidence that could be given by evidence absent a witness statement

# The new rules: referring to documents

Appendix paragraph 3.4 – a witness statement should refer to documents only when necessary. Generally not necessary unless:

- Important disputed matters of fact
- Witness evidence required to prove or disprove the content, date or authenticity of a document
- Needed to explain how a witness understood a document at the time
- Confirming whether the witness saw the document at the relevant time

# The new rules: what must be done?

- Identify by list what documents the witness has referred to or been referred to when preparing the witness evidence
- Statement on the quality of evidence:
  - How well the witness recalls the matters addressed
  - Whether, and if so how and when, that recollection has been refreshed by documents
  - Only on important disputed matters of fact and where practicable

# The new rules: prohibited content

Appendix paragraph 3.6 – statements should not:

- Quote at length from any document referred to
- Seek to argue the case, either generally or on particular points
- Take the court through the documents in the case or set out a narrative derived from the documents
- Include commentary on other evidence in the case, either documents or the evidence of other witnesses, save in very limited circumstances

# Proofing a witness under the new regime

Paras 3.4 and 3.8-3.13 of the Statement of Best Practice. Watch out for:

- Prescribed mechanism for drafting w/s (3.9)
- Description of process required (3.11)
- Iterations (3.7)
- Showing documents (3.4)
- Manner in which information is gathered (3.10)

## Form of w/s: need to list documents

- Per PD 57AC.3.2 a trial witness statement
  - *"must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in their trial witness statement"*.
- Consider:
  - Records?
  - Impact on privilege?

# Form of w/s: confirmation of compliance (PD 57AC.4)

*"I understand that the purpose of this witness statement is to set out matters of fact of which I have personal knowledge. I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.*

*This witness statement sets out only my personal knowledge and recollection, in my own words.*

*On points that I understand to be important in the case, I have stated honestly (a) how well I recall matters and (b) whether my memory has been refreshed by considering documents, if so how and when.*

*I have not been asked or encouraged by anyone to include in this statement anything that is not my own account, to the best of my ability and recollection, of events I witnessed or matters of which I have personal knowledge."*

# Legal representative's certificate of compliance (PD 57AC.4)

- Need for endorsement with a certificate of compliance:

*"I hereby certify that:*

- 1. I am the relevant legal representative within the meaning of Practice Direction 57AC.*
- 2. I am satisfied that the purpose and proper content of trial witness statements, and proper practice in relation to their preparation, including the witness confirmation required by paragraph 4.1 of Practice Direction 57AC, have been discussed with and explained to [name of witness].*
- 3. I believe this trial witness statement complies with Practice Direction 57AC and paragraphs 18.1 and 18.2 of Practice Direction 32, and that it has been prepared in accordance with the Statement of Best Practice contained in the Appendix to Practice Direction 57AC.*

# Sanctions for non-compliance

- Specified sanctions:
  - Refuse to give, or withdraw, permission to rely on part or all of a trial witness statement.
  - Strike out part or all of a trial witness statement.
  - Order that a trial witness statement be redrafted in accordance with PD 57AC or as may be directed by the court.
  - Make an adverse costs order against the non-complying party.
  - Order a witness to give some or all of their evidence in chief orally.
- Anti-avoidance provision

# Closing thoughts

- Advocacy: how to tell the story?
- Impact on costs-budgeting?
- Impact on witness statements not subject to the PD?



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